

JUL 29 1942

CHARLES ELMORE GROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 262-264

STROBEL STEEL CONSTRUCTION COMPANY,
a corporation,
Petitioner and Appellant below,

vs.

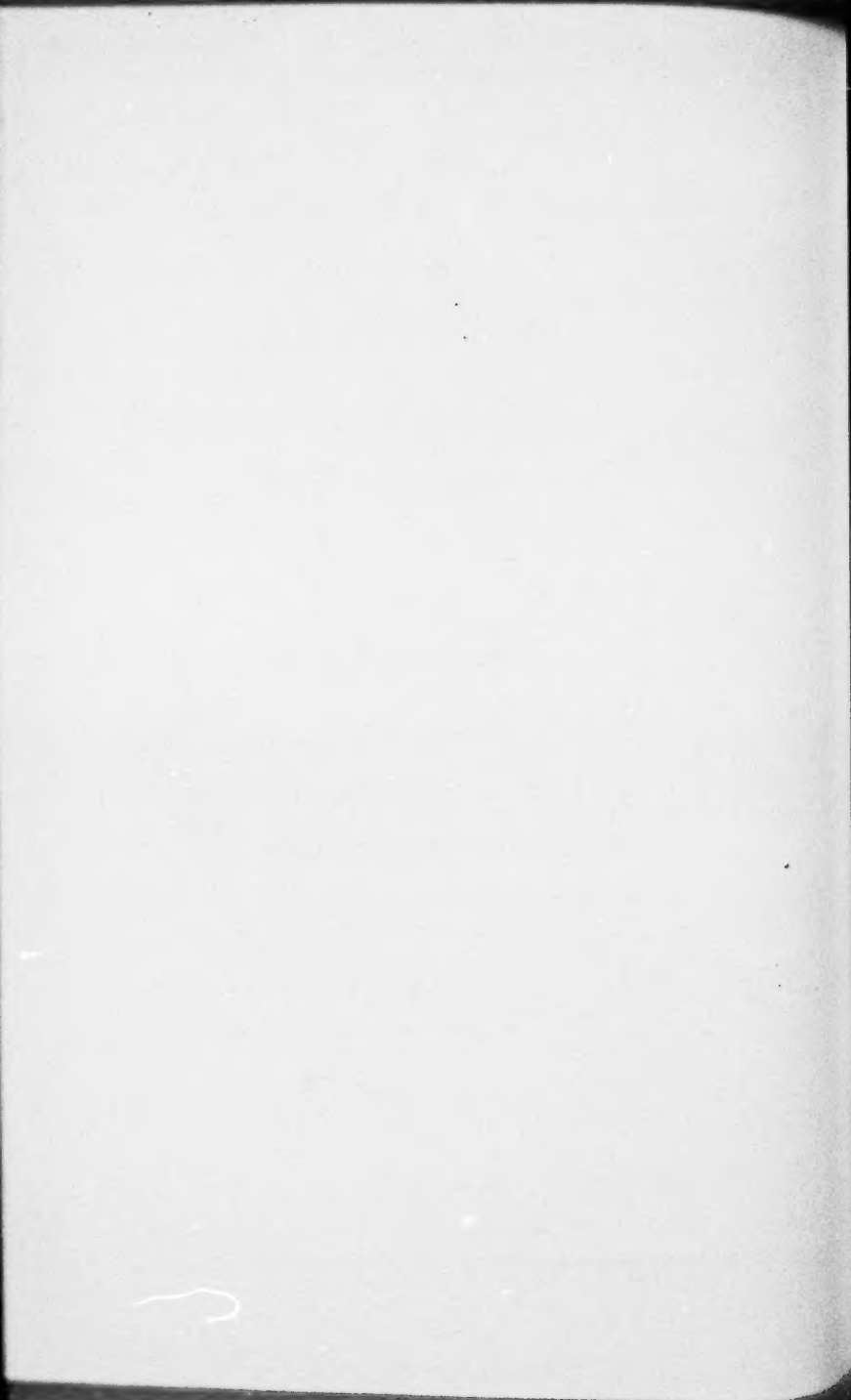
STATE HIGHWAY COMMISSIONER OF THE
STATE OF NEW JERSEY,
Respondent and Appellee below.

**PETITION FOR WRIT OF CERTIORARI TO THE
NEW JERSEY COURT OF ERRORS AND APPEALS,
AND BRIEF IN SUPPORT THEREOF.**

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,

*Attorneys for and of Counsel with
Petitioner,*

744 Broad Street,
Newark, New Jersey.



INDEX.

	PAGE
PETITION :	
I. Summary Statement of the Matter Involved.	2
II. Jurisdiction	5
III. The Questions Presented	6
IV. Reasons Relied Upon for the Allowance of the Writ	6
BRIEF :	
I. Opinions of the Courts Below.....	8
II. Jurisdiction	9
III. Statement of the Case.....	9
IV. Specification of Errors	10
V. Argument and Summary	10
POINT I.	11
CONCLUSION	16

CASES CITED.

<i>Federal Land Bank vs. Priddy</i> , 295 U. S. 295.....	16
<i>Federal Housing Administration vs. Burr</i> , 309 U. S. 242	16
<i>Keifer vs. Reconstruction Finance Corp</i> , 306 U. S. 381	16
<i>Reconstruction Finance Corp. vs. Menihan</i> , 312 U. S. 81	16

NEW JERSEY STATUTES.

Pamphlet Laws of 1917, Chapter 15.....	14
Pamphlet Laws of 1927, Chapter 319, Section 106...	12, 13
Pamphlet Laws of 1927, Chapter 331.....	14
Pamphlet Laws of 1929, Chapter 221, Section 111...	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____ .

STROBEL STEEL CONSTRUCTION COMPANY,
a corporation,

Petitioner and Appellant below,

vs.

STATE HIGHWAY COMMISSIONER OF THE STATE OF
NEW JERSEY,

Respondent and Appellee below.

**PETITION FOR WRIT OF CERTIORARI TO THE
NEW JERSEY COURT OF ERRORS AND APPEALS.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Strobel Steel Construction Company,
a corporation organized under the laws of Illinois and
licensed to transact business in New Jersey, respectfully
shows:

I.

Summary statement of the matter involved.

The within application for a writ of certiorari is prosecuted to review a judgment of the New Jersey Court of Errors and Appeals (the highest court of the State of New Jersey) entered April 30, 1942 affirming (a) a judgment of the New Jersey Supreme Court entered January 6, 1941 dismissing an alternative writ of *mandamus* directed to the State Highway Commissioner; and (b) the denial by the State Supreme Court of an application for certiorari to review the action of the State Highway Commissioner.

The basis of the judgment in the State courts throughout has been predicated upon the fact that both the State Highway Commissioner and his predecessor, the State Highway Commission, are adjuncts of the State of New Jersey, and are immune from suit without the consent of the State. The basis of the review sought here is that both the State Highway Commissioner, and his predecessor, the State Highway Commission, were authorized under the New Jersey statutes creating both offices to enter into contracts in the name of the State of New Jersey *or as independent contractors*, and, as petitioner claims, were entitled to sue and subject to be sued.

In order to appreciate the legal questions involved herein, the background will have to be inquired into somewhat in detail.

On July 10, 1929, petitioner and the New Jersey State Highway Commission (the agency then in complete charge

of State highways in the State of New Jersey) entered into a written contract for the erection of a steel bridge on New Jersey State Highway Route Number 10 running between Newark, New Jersey and New York City over the Hackensack River at Jersey City (R. 109). The bridge was a replacement of a bridge that had theretofore existed for many years.

The formal contract was based upon the plans and specifications on file in the Commissioner's office in Trenton which provided the basis for fixing the cost of such work and any extras that might be involved therein.

In due time the work was completed and a dispute arose as to the amount of extras to which petitioner claimed to be entitled. It sought relief with the then State Highway Commission, and later with the successor of that agency, the State Highway Commissioner. Petitioner claimed that it was entitled to \$780,327.22. The State Highway Commission and its successor, the State Highway Commissioner, conceded only \$8,520.48. The unusually large discrepancy created the basis for the litigation which ensued.

Petitioner first sued the State Highway Commission and the State Highway Commissioner in the common law courts of New Jersey on contract. The dismissal of the complaint on the ground that the defendants were immune from suit because of their sovereign characteristics was affirmed by the New Jersey Court of Errors and Appeals. 120 N. J. L. 298; 198 Atl. 774.

Petitioner then brought a proceeding in *Mandamus* to compel the then State Highway Commissioner (who had succeeded the former Commission) to pass upon its claims, and an alternative Writ was allowed for the purpose of

perfecting a record leading to a judgment which would be subject to an appeal to the Court of Errors and Appeal (R. 108).

While this proceeding was pending the then Commissioner purported to pass upon petitioner's claims, and (we assert, arbitrarily) without any hearing whatever adopted the amount of \$8,520.48 as the balance due upon petitioner's contract (R. 151, Par. 120).

Upon the Commissioner making this determination an application was made to the New Jersey Supreme Court for a Writ of Certiorari to review said action by the Commissioner. This application was denied by the Court, upon the ground that the State Highway Commissioner was the *alter ego* of the State and immune from any suit without its consent. 125 N. J. L. 622; 18 Atl. (2) 28.

In the meantime the State Highway Commissioner filed a demurrer to the Alternative Writ of *Mandamus*, which was sustained and the Writ dismissed.

Petitioner appealed to the New Jersey Court of Errors and Appeals from both the dismissal of the Alternative Writ of *Mandamus* and the denial of petitioner's application for a Writ of Certiorari, and the action of the New Jersey Supreme Court in both cases was sustained upon the ground of immunity from suit without the consent of the State. 128 N. J. L. 379; 25 Atl. (2) 903.

It is from these rulings of the highest Court of the State of New Jersey—the New Jersey Court of Errors and Appeals—that petitioner is applying to this Court for relief.

II.

Jurisdiction.

1. The date of the judgment of the New Jersey Court of Errors and Appeals to be reviewed is April 30, 1942. The within application is made within three months after the entry of such judgment.

2. The jurisdiction of this court to issue the writ of certiorari herein prayed for is invoked under Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925, 43 Statutes 938 (Title 28 U. S. C. Section 344).

3. *Petitioner claims* that under and by virtue of the Fourteenth Amendment to the Constitution of the United States of America it has been deprived of its constitutional rights in that the State of New Jersey deprived petitioner of its property without due process of law.

Respondent asserts that the State Highway Commission and its successor, the State Highway Commissioner, are adjuncts of the State of New Jersey and are immune from suit without its consent.

4. Petitions for writs of certiorari to review decisions in the highest courts of the various states which were violative of the Fourteenth Amendments to the Federal Constitution have heretofore been granted by this court.

III.

The questions presented.

1. Do the powers conferred upon a state body in the statute creating the body, such as authority to do its work *either as an independent contractor* or employer or through contracts made in the name of the State, confer upon the state body when it enters into a contract, *as an independent contractor* the right and responsibility of suing and being sued?

2. Is the decision of the highest Court of the State sustaining immunity from suit under such circumstances violative of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States, and contrary to the opinion of this Court in *Keifer vs. Reconstruction Finance Corp.*, (306 U. S. 381)?

IV.

Reasons relied upon for the allowance of the writ.

1. The decision of the New Jersey Court of Errors and Appeals in sustaining the immunity from suit of the State Highway Commission and its successor, the State Highway Commissioner, without the consent of the State of New Jersey first obtained is violative of rights guaranteed to petitioner under the Fourteenth Amendment to the Constitution of the United States of America.

2. The decision of the New Jersey Court of Errors and Appeals in sustaining immunity from suit of the State Highway Commission and its successor, the State Highway Commissioner, is in conflict with applicable decisions of this Court (*Keifer vs. Reconstruction Finance Corp.*, 306 U. S. 381, *Reconstruction Finance Corp. vs. Menihan*, 312 U. S. 81).

3. The issue of state's immunity under similar conditions existing throughout the country is one of national importance. It can arise in every state which has highway or other commissions in which immunity from suit has not been particularly reserved by the state legislature. This issue does not appear to have been squarely presented to or decided by this Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be named therein, a transcript of the record and proceedings herein; and that the judgment of the New Jersey Court of Errors and Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and meet.

Dated: July 25, 1942.

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
Attorneys for and of Counsel
with Petitioner.